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BALTIMORE

U.S. DISTRICT JUDGE DISMISSES LIBEL SUIT AGAINST PENTHOUSE
BY CAROL BOWERS

A federal judge dismissed a scientist's libel suit against Penthouse magazine Monday after the U.S. government took the rare step of refusing to release documents because of national security.

The suit, filed by James W. Fitzgerald, of Bethesda, alleged that a June 1977 article in Penthouse entitled "The Pentagon's Deadly Pets" libelously charged him with espionage. Penthouse International Ltd., the magazine's publishers, was named in the suit, which sought \$3 million in damages.

Both sides needed classified documents for their case. But in a rare move, John Lehman, secretary of the U.S. Navy, filed two declarations on Dec. 5, one public and one sealed. The public document said the documents could not be released because of the government's privilege to withhold information whose release could damage national security.

"I invoke the extraordinary measure of asserting a formal claim of state secrets privilege," he said in the public document.

The article concerned the alleged training of animals for military and intelligence purposes by the U.S. Navy and the Central Intelligence Agency.

Among the animals mentioned were dolphins, which Fitzgerald was testing for potential military purposes for the Navy and CIA at an outpost in Key West, Fla.

The article said that Fitzgerald, while conducting secret experiments, "made overtures" to sell "dolphin torpedoes" to some Latin American countries.

Fitzgerald maintained the statements were both false and defamatory.

During the seven years in which the case was in litigation, it was appealed to the 4th U.S. Circuit Court of Appeals in Richmond on two different occasions. In each appeal the case was remanded to the District Court here for further proceedings.

In March 1983, the case was appealed to the U.S. Supreme Court to clarify certain issues in the case. The court, without comment, left intact rulings that required Fitzgerald to prove not only that the article was false, but that it was written with "actual malice."

In the public declaration, Lehman noted that the marine mammal program "provides the department of the Navy and the U.S. with extremely valuable information which significantly enhances the development of naval systems dedicated to protecting the national security."

Lehman said the fact that the program exists is unclassified. But he said other aspects of the program have never been made public.

Speculation about military uses of marine mammals has been "fraught with error and fancy," Lehman said.